

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of ) WT DOCKET NO. 94-147  
 )  
**JAMES A. KAY, JR.** )  
 )  
Licensee of one hundred sixty four Part 90 )  
Licenses in the Los Angeles, California, Area )

To: Administrative Law Judge  
Richard L. Sippel

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WASHINGTON, D.C. 20554

**WIRELESS TELECOMMUNICATIONS BUREAU'S**  
**OPPOSITION TO MOTION FOR PARTIAL SUMMARY DECISION**

1. On April 17, 1995, James A. Kay, Jr. ("Kay") filed a Motion for Partial Summary Decision. The Wireless Telecommunications Bureau opposes Kay's Motion for the following reasons.

2. Kay requests the Presiding Judge to grant summary decision in his favor of the issues at ¶¶ 10(a), 10(c), 10(d), 10(e), 10(f), and 10(h) of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) ("HDO"). According to Kay, the Bureau has failed to present any genuine issue of material fact with respect to whether Kay has violated specific provisions of the Commission's Rules and/or the Communications Act of 1934, as amended. Kay's request for summary decision appears to be predicated solely upon the Bureau's responses to Kay's interrogatories produced during the discovery phase of this proceeding.

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3. The Bureau submits that Kay has failed to satisfy Section 1.251(a)(1) of the Commission's Rules. Section 1.251(a)(1) provides for summary decision "when there is no genuine issue of material fact for determination at hearing." It is well established that the moving party has the burden of establishing that summary decision is warranted. See e.g., Coyle Communications, Ltd., 3 FCC Rcd 2302 (ALJ 1988), citing, Summary Decision Procedures, 34 FCC 2d 485, 487-88 (1972). Furthermore, summary decision is an "extraordinary procedure" because it truncates the need for a full hearing. Meredith Corporation, 2 FCC Rcd 3927, 3928 (Rev. Bd. 1987). Consequently, "[i]n order to ensure administrative due process, the ALJ must carefully scrutinize the moving party's showing; even if he finds that the facts are undisputed, he nevertheless has discretion to proceed with the hearing if he deems it desirable in view of the nature of the proceeding or the surrounding circumstances." GAF Broadcasting Company, 96 FCC 2d 411, 416-417 (Rev. Bd. 1984).

4. In the instant case, it belies logic how Kay can argue in good faith that there are no facts in dispute with respect to the issues for which he seeks summary decision. For example, Kay claims that the so-called "Section 308(b) Issue" at ¶ 10(a) of the HDO should be decided in his favor because "Section 308(b) does not impose any duty on either an applicant or a licensee to respond in any way to a Commission inquiry." Motion, at p. 2. This is ridiculous. In Warren L. Percival, 8 FCC 2d 333, 334 (1967), the Commission issued an order of revocation against a licensee for the willful violation of Section 308(b) of

the Act because the licensee had withheld "requested and relevant information from the Commission." Similarly, in Carol Music, Inc., 37 FCC 379, 383-384 (1964), the Commission stated:

While information which is self-incriminatory may be withheld, the licensee, in doing so, frustrates the Commission in the performance of its duty. In such event, denial or revocation of a license where such information is not furnished may be warranted on this ground alone, since it is the licensee who deprives the Commission of information necessary to determine its compliance with the public interest standard . . . The Commission is not required to bargain with its licensees for material to which it is entitled in order to properly carry out its functions.

In designating the issue for hearing in the instant case, the Commission plainly made the determination that a material and substantial question of fact exists as to whether Kay violated Section 308(b) of the Act. Kay presents nothing to demonstrate that the issue is now ripe for resolution in his favor.

5. Similarly, there is no merit to Kay's request for summary decision of the remaining issues in question. Kay merely suggests over and over again that the information which the Bureau produced in response to Kay's interrogatories failed to establish a *prima facie* showing of any rule violations. However, as the Presiding Judge has recognized, the scope of permissible discovery against the Bureau is restricted by the Commission's Rules. See Order, FCC 95M-102 (released April 7, 1995) ("This interrogatory discovery was never intended to require the Bureau to delineate the universe of its evidence and trial theories."). Kay erroneously concludes, based on the Bureau's answers to his interrogatories, that there are no genuine issues of material fact which would warrant a hearing. Kay's conclusion simply is not justified.

6. Whether Kay constructed and operated his land mobile stations in compliance with the Commission's Rules are matters which unquestionably remain in dispute. Kay does not introduce any new information or revelations which would allow the Presiding Judge to resolve the issues in Kay's favor. Indeed, all Kay appears to do, on the basis of the Bureau's response to his interrogatories, is dispute the grounds upon which the issues in the HDO were initially designated. In essence, Kay's request is nothing more than a thinly-veiled and unauthorized petition for reconsideration of the HDO and the latest in a series of ill-conceived attempts by Kay to avoid going to trial. See, e.g., Memorandum Opinion and Order, FCC 95M-24 (released January 30, 1995); Memorandum Opinion and Order, FCC 95M-25 (released January 31, 1995); and Memorandum Opinion and Order, FCC 95M-49 (released February 15, 1995); Order, FCC 95M-56 (released February 22, 1995). Kay's request for summary decision is patently frivolous, and the Presiding Judge should consider taking appropriate action pursuant to Section 1.251(f) of the Commission's Rules.

7. Based on the foregoing, there is no basis whatsoever for granting summary decision in Kay's favor of any of the issues specified in the HDO. Accordingly, Kay's

Motion for Partial Summary Decision should be denied.<sup>1</sup>

Respectfully submitted,  
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May 1, 1995

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<sup>1</sup> On April 17, 1995, Kay also filed with the Presiding Judge a "Request for Permission to File Motion for Partial Summary Decision." This pleading should be dismissed because Kay is not required to obtain permission to file a motion for summary decision more than 20 days prior to commencement of the hearing. See § 1.251(a)(1) of the Commission's Rules.

## CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Complaints and Investigations Branch, Mass Media Bureau, certify that I have, on this 1st day of May 1995, sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Motion for Partial Summary Decision" to:

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